

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2006-0174, State of New Hampshire v. Thomas Jurentkuff, the court on May 22, 2007, issued the following order:

The defendant, Thomas Jurentkuff, appeals his conviction for driving while intoxicated, subsequent offense. He argues that the trial court erred in denying his request to order the State to examine a police personnel file for exculpatory evidence and in refusing to admit evidence or to instruct the jury on the legal significance of a .03 breathalyzer reading. We affirm.

We review a trial court's decision on the management of discovery under an unsustainable exercise of discretion standard. State v. Amirault, 149 N.H. 541, 543 (2003).

In this case, the trial court found that the State had represented that it had complied with the requirements of State v. Laurie, 139 N.H. 325 (1995). In her motion to compel the State to make further inquiry about exculpatory evidence, defense counsel specifically stated that she was not implying that the State was not "complying with its constitutional duties." In the absence of any allegation that the State failed to comply with its responsibilities under Laurie, we conclude that, contrary to the defendant's assertion, Petition of State of New Hampshire (State v. Theodosopoulos), 153 N.H. 318 (2006), is inapplicable to this case. We find no error in the trial court's ruling.

The defendant also contends that the trial court erred in refusing to admit evidence on the legal significance of a .03 breathalyzer reading. We review a trial court's decision on the admissibility of evidence under an unsustainable exercise of discretion standard. Amirault, 149 N.H. at 543.

At trial, the defendant sought to admit evidence that his performance on an HGN test in 2002 had indicated possible impairment but that a breath test conducted at the same stop indicated a breath alcohol content of .03. The trial court denied the request, stating, "You cannot use the HGN to establish a certain BAC." When the defendant attempted to distinguish his purpose in offering the evidence, the trial court found that, even if the evidence were offered for another purpose, the jury would likely draw that same conclusion.

We will assume without deciding that this evidence was relevant and that its exclusion was error. Based upon the record before us, we conclude that any error was harmless. See State v. Dorval, 144 N.H. 455, 457 (1999) (error

harmless if erroneously excluded evidence was cumulative or inconsequential and did not affect verdict). The evidence at trial included testimony that, although the defendant failed the HGN test in 2002, his BAC was .03 and he was not prosecuted for DWI. At the time of his 2004 arrest, the defendant hit signs when he pulled into a parking lot, failed four field sobriety tests and was unable to walk without support. He had an odor of alcohol and exhibited slurred speech and glassy and bloodshot eyes. He also declined the BAC test.

The defendant also contends that the trial court erred in declining to instruct the jury on the legal significance of a .03 breathalyzer reading. We review this decision under an unsustainable exercise of discretion standard. State v. Lavoie, 152 N.H. 542, 547 (2005). Having reviewed the record before us, we conclude that the trial court's charge adequately and accurately explained each element of the offense charged following the defendant's 2004 arrest. See State v. Littlefield, 152 N.H. 331, 333-34 (2005) (setting forth factors considered and scope of review when reviewing appellate challenges to jury instructions).

Affirmed.

DALIANIS, GALWAY and HICKS, JJ., concurred.

**Eileen Fox,
Clerk**